

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Engineering Division
Honolulu, HI 96813

February 11, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PERMISSION TO ENTER MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF
LAND AND NATURAL RESOURCES AND HONOLULU MARINE L.L.C.

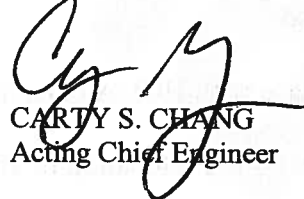
Background:

The 2005 Legislature approved the lease of land at Keehi Small Boat Harbor to Honolulu Marine LLC. In 2008, the Legislature appropriated \$4 million for plans, design and construction of a bulkhead, pier, pad, stormwater management system, and utilities to assist in the relocation of Honolulu Marine LLC to the Keehi Small Boat Harbor. The Memorandum of Agreement delineates the responsibilities of both parties commencing with the design phase and ending with final acceptance of the construction work and completion of all applicable maintenance periods. It includes conditions for disbursement of the appropriated money on a reimbursement basis.

Recommendation:

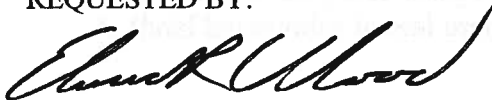
That the Board authorize the Chairperson to sign the Memorandum of Agreement between the Department of Land and Natural Resources and Honolulu Marine LLC subject to approval as to form by the Attorney General's office.

Respectfully submitted,


CARTY S. CHANG
Acting Chief Engineer


Attachment

REQUESTED BY:



EDWARD R. UNDERWOOD, Administrator
Division of Boating and Ocean Recreation

APPROVED FOR SUBMITTAL:


LAURA H. THIELEN, Chairperson

ITEM L-4

HONOLULU MARINE MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (MOA) is entered into by and between the Department of Land and Natural Resources of the State of Hawaii ("DLNR"), through the Board of Land and Natural Resources, and Honolulu Marine, LLC ("HM LLC"). DLNR and HM LLC are collectively referred to as the "Parties".

This MOA is designed to promote increased understanding, cooperation, and interaction, and to provide basic principles and guidelines for the Parties to participate in the planning, design, and construction of a new facility at Keehi Small Boat Harbor.

I. RECITALS

WHEREAS, HM LLC currently operates a commercial maritime vessel construction and repair facility on 103,597 square-feet of public lands located at Kewalo Basin leased from and under the jurisdiction of the Hawaii Community Development Authority (HCDA); and

WHEREAS, HM LLC's operational activities include the construction of new vessels and the repair and maintenance of maritime vessels owned by P&R Water Taxi, Ltd., the United States Navy, and other government and private parties involved in marine research, fishing, and commercial tugboat and barge services; and

WHEREAS, the existing marine vessel repair use of the existing property is inconsistent with the development plan and land use under HCDA's Kakaako Makai area plan; and

WHEREAS, HCDA has requested that HM LLC vacate its leased premises under the threat of condemnation; and

WHEREAS, HM LLC's lease with HCDA extends until the year 2021; and

WHEREAS, a suitable site for the relocation of HM LLC has been found at Keehi Small Boat Harbor ; and

WHEREAS, the proposed site for the relocation is 71,351 square-feet (48,351 square feet of fast land, 23,000 square feet of fill land, and 20,900 square feet of submerged land) at Keehi Small Boat Harbor, TMK: 1-2-025:024; and

WHEREAS, the 2005 Legislature approved the lease of the land at Keehi Small Boat Harbor to HM LLC pursuant to Senate Concurrent Resolution 134 SD1, HD1, Session Laws of Hawaii 2005; and

WHEREAS, HM LLC's relocation to the proposed site would require improvements totaling an estimated \$10 million; and

WHEREAS, HM LLC's closure would force maritime vessels to seek maintenance elsewhere and require larger tugboats to be constructed at US Mainland shipyards; and

WHEREAS, the development of such a facility at Keehi Small Boat Harbor would benefit the State as lessor and landowner; and

WHEREAS, the State Legislature in Act 158, 2008 Haw. Sess. Laws 424, Item H-24.02, appropriated \$4 million for plans, design, and construction of a bulkhead, pier, pad, stormwater management system, and utilities to assist in the relocation of HM LLC from HCDA's property to Keehi Small Boat Harbor, which shall be provided on a reimbursement basis as detailed later in this MOA; and

WHEREAS, HM LLC shall be responsible for the balance of all costs required to make the improvements it would require to operate a commercial maritime vessel construction and repair facility; and

WHEREAS, Keehi Small Boat Harbor is owned by the State of Hawaii and is under the jurisdiction of the Department of Land and Natural Resources; and

WHEREAS, DLNR and HM LLC will proceed to enter into direct negotiations for a lease of certain fast and submerged lands within the Keehi Small Boat Harbor area; and

WHEREAS, HM LLC has an interest in the development of a functional facility for its business operations.

NOW THEREFORE, the Parties agree as set forth hereinbelow.

II. AGREEMENT

The purpose of this MOA is to establish the roles, responsibilities, funding, and procedures by which HM LLC and DLNR will jointly fund the design and construction of a maritime construction and repair facility at Keehi Small Boat Harbor.

HM LLC and DLNR hereby agree as follows:

1. To work together towards the goal of constructing improvements at Keehi Small Boat Harbor for the use of HM LLC as a lessee.
2. To allow HM LLC to contract all work required to plan, design and construct the improvements in acknowledgement of its expertise in the operations of a maritime vessel construction, maintenance and repair facility.
3. That this MOA does not establish a legal partnership or a partnership of a joint venture relationship between HM LLC and DLNR, and does not establish any other legal entity. Neither party shall have either the liability of a partner or the power to bind the other party.

4. That HM LLC shall enter into contracts for all work to be done and shall be responsible for making all payments required for completion of the work in a timely manner and shall only make such payments upon satisfactory completion of the work as determined by DLNR.
5. That DLNR shall not reimburse HM LLC for any payment of work which is determined to be outside the scope of work as defined in Act 158, 2008 Haw. Sess. Laws 424, Item 24.02. The Act 158 work is limited to plans, design, and construction of a bulkhead, pier, pad, storm water management system and installation of utilities at Keehi Small Boat Harbor (the utilities are further detailed in Exhibit A and made a part hereof).
6. That the maximum reimbursement HM LLC is eligible to receive from DLNR for work within the scope of this MOA at Keehi Small Boat Harbor shall not exceed either the total cost of work or four million dollars (\$4,000,000), whichever is less.
7. That HM LLC shall assume all repair and maintenance for improvements constructed under this MOA, including, but not limited to, infrastructure shared with DLNR and facility maintenance and security, for the term of this MOA and for all of HM LLC's tenancy at Keehi Small Boat Harbor, and shall assume all liability for, including, but not limited to, the results of design deficiencies and oversights, failure to obtain operational permits, and other construction, maintenance, or operational problems relating to the improvements constructed under this MOA, and such assumption of liability shall survive the termination of this MOA and HM LLC's tenancy at Keehi Small Boat Harbor.
8. Ownership of the improvements constructed under this MOA shall be as provided for in HM LLC's lease with DLNR for HM LLC's tenancy at Keehi Small Boat Harbor.

Design Phase
HM LLC shall:

1. Provide DLNR with a schedule of the work to be accomplished and a copy of the consultant contract for design services in a timely manner.
2. Ensure that the design is in compliance with all applicable design codes and regulations. DLNR's review and approval of plans and submittals shall not be construed as ensuring compliance.
3. Be responsible for obtaining ALL permits required to make the improvements and shall provide copies of all such permits to DLNR.
4. Receive reimbursement for payments made by HM LLC to the Design Consultant contracted with by HM LLC for design services, not to exceed three hundred fifty thousand dollars (\$350,000). Reimbursements will be made at a rate of \$350,000 divided by the actual contracted dollar value of the design services. There shall be four points at which HM LLC will be eligible to receive reimbursement (at the rate described in this paragraph) for payments made by HM LLC to its Design Consultant for services

rendered. The four points will occur upon approval of four submittals: Conceptual Plans; Preliminary Plans, Specifications, and Cost Estimates; Pre-Final Plans, Specifications, and Cost Estimates; and Final Plans, Specifications, and Cost Estimates. Each of these submittals shall include a copy of the Design Consultant's billing to HM LLC, a receipt from the Design Consultant confirming HM LLC's payment of the bill, and a cover letter which commits to working with DLNR to address all comments received and requesting reimbursement upon approval.

5. Prepare monthly written status reports for the Project, including a detailed financial accounting, listing of permits indicating status as pending or acquired, schedule update, and other status information requested by DLNR.
6. Submit Conceptual Plans to DLNR which show all proposed infrastructure improvements and modifications. DLNR is especially interested in improvements and modifications to shared infrastructure items such as roadways, utility lines, drainage improvements, comfort stations, etc., as they may impact the public's use of the small boat harbor both during construction and in the future. Submit Preliminary Plans, Specifications, and Construction Cost Estimate to DLNR for review and comment when the design is approximately 35% complete.
7. Submit Prefinal Plans, Specifications, and Construction Cost Estimate to DLNR for review and comment when the design is approximately 70% complete.
8. Submittal of Final Plans, Specifications, and Construction Cost Estimate to DLNR for review and comment/approval. This final reimbursement for design services rendered shall be contingent upon approval of the complete package by DLNR.

Construction Phase

Since DLNR needs to ensure that construction is performed in compliance with all applicable local and national standards and in recognition of the fact that certain improvements may have an impact on the public's use of the boat harbor, **HM LLC shall do the following** in order to be eligible for reimbursements under this phase of work:

1. Make a concerted effort to bid the construction package competitively to ensure the most efficient use of the public component of funding for the construction of the project. Written documentation of this effort, in the form of written, itemized bid quotations, shall be provided to DLNR for approval.
2. Enter into a contract with a Contractor who has the appropriate license to do the work according to Hawaii State Licensing Laws.
3. Ensure that the Contractor's subcontractors all have the appropriate licenses to perform their respective portions of the construction work.
4. Submit a listing of bids received and information for the Contractor HM LLC proposes to make the award to (including applicable contractor's licensing information, performance bonds, certificate of liability insurance, and a listing of subcontractors to be used on the project) for DLNR's

approval. DLNR's approval shall not be construed as relieving HM LLC of its due diligence responsibility in complying with items 1-3 above and shall not be construed as assuming any responsibility or liability for HM LLC's bid process or selection of its Contractor.

5. Submit a copy of the executed contract between HM LLC and the Contractor, bid breakdown, and list of subcontractors for review by DLNR.
6. Provide a statement certifying that HM LLC has obtained, prior to commencement of construction, any and all rights-of-way necessary for construction of the Project.
7. Provide a statement certifying that HM LLC has obtained, from the appropriate government agencies, all clearances, permits, licenses, and other approvals necessary to proceed with the construction phase of the project. HM LLC shall provide copies of documentation to confirm said clearances, permits, licenses, and other approvals to DLNR in a timely manner. HM LLC shall assume the entire responsibility for any failure to obtain necessary clearances, permits, licenses, and other approvals, and for any failure to comply with the terms and conditions of their issuance or with applicable laws.
8. Provide DLNR with a construction schedule prior to commencement of work, which includes all milestones for inspection, and update said construction schedule in a timely manner.
9. Provide adequate inspection of the construction work and provide DLNR with sufficient advanced notice to allow DLNR representatives to conduct their own independent inspections of specific activities or at particular milestones as specified by DLNR.
10. During construction, HM LLC shall ensure the following:
 - a. Adequate traffic control measures are implemented to ensure safe conditions for both vehicular and pedestrian traffic;
 - b. Access to the boat ramp, piers, loading docks, comfort stations, parking spaces, office buildings and other areas of Keehi Small Boat Harbor are not restricted as to the permittees, the public, or DLNR employees and representatives;
 - c. Utility service (water, wastewater, electrical, etc.) shall not be disrupted for permittees, the public, or DLNR employees and representatives; and
 - d. Drainage features shall not be compromised.
11. Receive reimbursement for payments made by HM LLC to the Contractor contracted with by HM LLC for construction services, not to exceed three million six hundred fifty thousand dollars (\$3,650,000). Reimbursements will be made at a rate of \$3,650,000 divided by the contracted dollar value of the construction. HM LLC will be eligible to receive reimbursement (at the rate described in this paragraph) upon verified payments made for completed construction services on a monthly basis.
12. Be responsible for ensuring that the Contractor adheres to all Best Management Practices, monitoring, security, and daily maintenance activities of the construction site and shall pay any fines levied upon the State as property owner due to HM LLC's failure to do so and take whatever

actions are required to satisfy the permitting agency in a timely manner at no cost to DLNR.

13. Submit written monthly progress reports of the construction work. The monthly progress report may be accompanied by a copy of the Contractor's bill to HM LLC, verification of payment to the contractor by HM LLC, and a detailed breakdown of the work associated with the billing.
14. Correct construction deficiencies identified during inspections by DLNR.
15. Provide for proper notification and participation of representatives of DLNR in both the pre-final and final inspections of the project and accept responsibility for ensuring that all punchlist items are addressed before final acceptance and billing.
16. Submit, along with the final billing for the project, a complete set of as-built drawings and specifications, proof of construction permit closures as appropriate, and applications for industrial facility NPDES and other necessary operational permits and certifications.
17. Maintain all books, documents, papers, records, supporting cost proposals, account records, and other evidence pertaining to project costs, and make such materials available to the Parties to this MOA or their designees for inspection and audit at all reasonable times during the MOA period and for three (3) years after the date of final payment to the Contractor, whichever is later in time.
18. Indemnity and Defense by HM LLC; Insurance. For the purpose of the State of Hawaii's participation in the planning, design, and construction of a bulkhead, pier, pad, stormwater management system, and utilities to assist in the relocation of HM LLC from HCDA's property to Keehi Small Boat Harbor, HM LLC agrees in behalf of HM LLC and its members, beneficiaries, heirs, executors, administrators, representatives, successors, assigns, and any person or entity acting for, under, or through them, to indemnify, defend, and hold harmless the State of Hawaii, its officials, employees, representatives, and agents, against any claim or liability, including all loss, damages, costs, expenses, attorney's fees, and penalties, for any damage to real or personal property, including environmental damage, or injury to or death of persons, or violation of or noncompliance with applicable law, when such penalties, damage, injury, or death results from, arises out of, or is connected with the planning, design, and construction of a bulkhead, pier, pad, stormwater management system, and utilities at Keehi Small Boat Harbor by HM LLC under this MOA or an applicable lease.
HM LLC shall acquire and maintain an insurance policy (or policies) with coverage that enables HM LLC to fully comply with its promise to indemnify and defend. Said insurance policy (or policies) must name the State of Hawaii as an additional insured and is required beginning on the date of execution of this MOA and shall cover all acts or omissions that occur or arise under this MOA and up to the time the Notice of Final Acceptance of the work by DLNR is received by HM LLC. These insurance provisions are intended to support compliance with, but not limit,

abrogate, or change, indemnity, maintenance, and other provisions set forth in this MOA.

HM LLC shall accept full responsibility for any property damage, injury, death, or penalties caused by the acts or omissions of HM LLC's Design Consultant or HM LLC's Contractor and its Subcontractors acting within the scope of the work encompassed by this MOA to the fullest extent of the law.

DLNR shall:

1. Review, provide comments for, and/or make decisions on all submittals by HM LLC in a timely manner.
2. Work with HM LLC to inform the harbor users of any impacts that may result from the construction and shall make a good faith effort to fairly balance the needs of the public, the operation of Keehi Small Boat Harbor by DLNR, the needs of other users of Keehi Small Boat Harbor, and the facilitation of the construction effort.
3. Make prompt reimbursement payments in accordance with this MOA to HM LLC whenever HM LLC meets the requirements for reimbursement set forth in this MOA.

III. CONDITIONS

This MOA shall be effective upon its full execution by the Parties.

This MOA shall be in full force and effect and shall remain in effect until the work, including final payment and all construction warranty and landscape maintenance periods, have been completed to the mutual satisfaction of both Parties. The indemnity and defense promises of HM LLC, assumption of liability by HM LLC, and repair and maintenance promises of HM LLC, in this MOA, and any terms of this MOA that relate to the lease to be entered into between HM LLC and DLNR for Keehi Small Boat Harbor, shall survive the termination of this MOA.

Governing Law. This MOA shall be governed by the laws of the State of Hawaii.

Amendments. This MOA may be amended only by the written agreement of the Parties hereto.

Binding Effect. Upon execution of this MOA by both Parties, the Parties shall cooperate and negotiate in good faith conditions and terms to complete and execute the definitive documents and instruments necessary to accomplish the intended goals of the MOA. Terms and conditions of any future agreement shall be consistent with this MOA and upon such other terms as the Parties shall agree.

KEY OFFICIALS AND CONTACTS:

Designated points of contact for the coordination of this project are as follows:

For Honolulu Marine, LLC:

For DLNR's Division of Boating and
Ocean Recreation:

For DLNR's Engineering Division:

IN WITNESS WHEREOF, the parties hereto execute this MOA by way of the signatures
and date(s) below:

HONOLULU MARINE, LLC

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

(Evidence of the authority of Honolulu Marine, LLC's representative(s) to sign this
memorandum of agreement for Honolulu Marine, LLC must be attached.)

APPROVED AS TO FORM:

Deputy Attorney General

Date: _____

STATE OF HAWAII, DEPARTMENT
OF LAND AND NATURAL RESOURCES

LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

DRAFT

State of _____)
) SS.
_____ County of _____)

On this _____ day of _____, 2010, before me
appeared _____ and _____ to
me personally known, who, on oath deposed and said that (they are/he is/she is) the
_____ and _____, respectively, of Honolulu Marine
LLC, that such person(s) executed the forgoing instrument as the free act and deed of
such person(s), and if applicable in the capacity shown, having been duly authorized to
execute such instrument in such capacity.

Notary Public, State of _____

Print Name

My Commission Expires: _____

(Official Stamp or Seal)

Date of Document: _____ No. of Pages: _____

Description of Document: _____

Notary's Printed Name: _____ Circuit

Notary's Signature

Date

(Official Stamp or Seal)

EXHIBIT A
Honolulu Marine Memorandum of Agreement
Proposed Shared Improvements

October 29, 2009

Utilities:

1. Water System:

- a. Provide new water transmission main that is connected to the BWS transmission main in the Sand Island Access Road.
- b. Provide fire hydrants along the new water transmission main in accordance with the City and County Fire Department and BWS standards.
- c. The new water system shall be designed and constructed in accordance with the Water System Standards, latest edition.
- d. Provide a BWS approved Reduced Pressure Principle backflow preventer and water meter.
- e. Provide Tee of equal size to the transmission main, gate valve, nipple, cap or plug and concrete block/beam.
- f. Pay BWS for applicable water system facility charge.
- g. Pay for the repair and maintenance of the backflow preventer and water meter, water lines and appurtenances after the (Honolulu Marine) water meter.

2. Electrical System:

- a. Provide new electrical transmission line to the Honolulu Marine facility.
- b. The new electrical system shall be designed and constructed in accordance with Hawaiian Electric Company (HECO) standards.
- c. The electrical transmission main shall be installed underground.
- d. Install separate HECO electric meter.
- e. Pay HECO for applicable electrical connection charges.
- f. Pay for the repair and maintenance of the electrical system and appurtenances installed under this MOA.

3. Sewer System:

- a. The new sewer system shall be designed and constructed in accordance with the City and County of Honolulu, Department of Environmental Services Sewer System Standards, latest edition.
- b. Install grease interceptor and/or screen to mitigate grease and/or debris from entering the sewer system.
- c. Install sewer meter.

- d. Pay for applicable sewer system facility and/or connection charges to the Department of Environmental Services.
 - e. Pay for the repair and maintenance of the sewer system that was installed under this MOA.
 - f. Prepare and implement program to mitigate the discharge of chemicals and debris into the sewer system.
4. Drainage System:
- a. Design and construct improvements to treat and/or contain all storm water run-off generated on the Honolulu Marine facility.
 - b. Prepare and obtain a State of Hawaii, Department of Health, Clean Water Branch Permit for NPDES General Permit Coverage Authorizing Discharge of Storm Water and Certain Non-Storm Water Discharges from small Municipal Separate Storm Sewer Systems (MS4).
 - c. The drainage system shall be designed to eliminate all contaminated run-off from entering the ocean and/or the adjacent DOBOR property.
 - d. Prepare and implement Best Management Practices to mitigate contaminated storm water run-off.
 - e. Pay for the repair and maintenance of the drainage system that was installed under this MOA.

